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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 WILLIAM McGUCKIE,

12 Plaintiff,

13 v.

14 CAROLYN W. COLVIN,  
15 Acting Commissioner of Social Security,

16 Defendant.  
17

) Case No. CV 13-8308-JEM  
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)

) MEMORANDUM OPINION AND  
) ORDER AFFIRMING DECISION OF  
) THE COMMISSIONER OF SOCIAL  
) SECURITY  
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18 **PROCEEDINGS**

19 On November 15, 2013, William McGuckie ("Plaintiff" or "Claimant") filed a  
20 complaint seeking review of the decision by the Commissioner of Social Security  
21 ("Commissioner") denying Plaintiff's application for Social Security Disability and  
22 Disability Insurance benefits. The Commissioner filed an Answer on February 19, 2014.  
23 On June 16, 2014, the parties filed a Joint Stipulation ("JS"). The matter is now ready for  
24 decision.

25 Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this  
26 Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record  
27 ("AR"), the Court concludes that the Commissioner's decision must be affirmed and this  
28 case dismissed with prejudice.

## BACKGROUND

Plaintiff is a 53-year-old male who applied for Social Security Disability and Disability Insurance benefits on August 31, 2011, alleging disability beginning June 6, 2009. (AR 11.) The ALJ determined that Plaintiff has not engaged in substantial gainful activity during the period from his alleged onset date of June 6, 2009 through his date last insured of June 30, 2013. (AR 13.)

Plaintiff's claim was denied initially on February 24, 2012 and on reconsideration on July 12, 2012. (AR 11.) Plaintiff filed a timely request for hearing and on June 18, 2013 Administrative Law Judge ("ALJ") T. Patrick Hannon held a video hearing from San Jose, California. (AR 11.)<sup>1</sup> Vocational expert ("VE") Jo Ann M. Yoshioka appeared and testified at the hearing. (AR 11.)

The ALJ issued an unfavorable decision on July 18, 2013. (AR 11-17.) The Appeals Council denied review on September 11, 2013. (AR 1-3.)

## DISPUTED ISSUES

As reflected in the Joint Stipulation, Plaintiff only raises the following disputed issue as ground for reversal and remand:

1. Whether the ALJ properly considered Plaintiff's credibility.

## STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and based on the proper legal standards).

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<sup>1</sup> Claimant did not personally appear for the hearing in Long Beach, California, but a couple of Reports of Contact in the record serve to confirm that he was fully aware of this hearing, and chose not to appear. When asked to comment on this subject, Claimant's attorney of record, Ryan Fox from the Law Office of Bill Latour informed the ALJ that the office had lost touch with Claimant "for a while." Considering these circumstances, the ALJ found Claimant to be an unnecessary participant in his oral hearing. Therefore, the hearing took place as scheduled, with Claimant's attorney of record representing him in these matters. (AR 11.)

1 Substantial evidence means “‘more than a mere scintilla,’ but less than a  
2 preponderance.” Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting  
3 Richardson v. Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such  
4 relevant evidence as a reasonable mind might accept as adequate to support a  
5 conclusion.” Richardson, 402 U.S. at 401 (internal quotation marks and citation  
6 omitted).

7 This Court must review the record as a whole and consider adverse as well as  
8 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).  
9 Where evidence is susceptible to more than one rational interpretation, the ALJ’s  
10 decision must be upheld. Morgan v. Comm’r of the Soc. Sec. Admin., 169 F.3d 595, 599  
11 (9th Cir. 1999). “However, a reviewing court must consider the entire record as a whole  
12 and may not affirm simply by isolating a ‘specific quantum of supporting evidence.’”  
13 Robbins, 466 F.3d at 882 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.  
14 1989)); see also Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

### 15 THE SEQUENTIAL EVALUATION

16 The Social Security Act defines disability as the “inability to engage in any  
17 substantial gainful activity by reason of any medically determinable physical or mental  
18 impairment which can be expected to result in death or . . . can be expected to last for a  
19 continuous period of not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A),  
20 1382c(a)(3)(A). The Commissioner has established a five-step sequential process to  
21 determine whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920.

22 The first step is to determine whether the claimant is presently engaging in  
23 substantial gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the  
24 claimant is engaging in substantial gainful activity, disability benefits will be denied.  
25 Bowen v. Yuckert, 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether  
26 the claimant has a severe impairment or combination of impairments. Parra, 481 F.3d at  
27 746. An impairment is not severe if it does not significantly limit the claimant’s ability to  
28 work. Smolen, 80 F.3d at 1290. Third, the ALJ must determine whether the impairment

1 is listed, or equivalent to an impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I  
2 of the regulations. Parra, 481 F.3d at 746. If the impairment meets or equals one of the  
3 listed impairments, the claimant is presumptively disabled. Bowen, 482 U.S. at 141.  
4 Fourth, the ALJ must determine whether the impairment prevents the claimant from  
5 doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001).  
6 Before making the step four determination, the ALJ first must determine the claimant's  
7 residual functional capacity ("RFC"). 20 C.F.R. § 416.920(e). The RFC is "the most  
8 [one] can still do despite [his or her] limitations" and represents an assessment "based  
9 on all the relevant evidence." 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The RFC  
10 must consider all of the claimant's impairments, including those that are not severe. 20  
11 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling ("SSR") 96-8p.

12 If the claimant cannot perform his or her past relevant work or has no past  
13 relevant work, the ALJ proceeds to the fifth step and must determine whether the  
14 impairment prevents the claimant from performing any other substantial gainful activity.  
15 Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000). The claimant bears the burden of  
16 proving steps one through four, consistent with the general rule that at all times the  
17 burden is on the claimant to establish his or her entitlement to benefits. Parra, 481 F.3d  
18 at 746. Once this prima facie case is established by the claimant, the burden shifts to  
19 the Commissioner to show that the claimant may perform other gainful activity.  
20 Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a finding that a  
21 claimant is not disabled at step five, the Commissioner must provide evidence  
22 demonstrating that other work exists in significant numbers in the national economy that  
23 the claimant can do, given his or her RFC, age, education, and work experience. 20  
24 C.F.R. § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is  
25 disabled and entitled to benefits. Id.

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## THE ALJ DECISION

1 In this case, the ALJ determined at step one of the sequential process that Plaintiff  
2 has not engaged in substantial gainful activity during the period from his alleged onset  
3 date of June 6, 2009 through his date last insured of June 30, 2013. (AR 13.)

4 At step two, the ALJ determined that Plaintiff has the following medically  
5 determinable severe impairments: back pain with minor degenerative changes and right  
6 elbow degenerative joint disease, and a combination of shoulder and foot pain by history  
7 with obesity. (AR 13-14.)

8 At step three, the ALJ determined that Plaintiff does not have an impairment or  
9 combination of impairments that meets or medically equals the severity of one of the  
10 listed impairments. (AR 14.)

11 The ALJ then found that, through the date last insured, Plaintiff has the RFC to  
12 perform essentially the full range of light work as defined in C.F.R. § 404.1567(b). (AR  
13 14-16.) In determining this RFC, the ALJ made an adverse credibility determination.  
14 (AR 16.)

15 At step four, the ALJ found that Plaintiff, through the date last insured, was unable  
16 to perform any of his past relevant work as a journeyman carpenter, sheet rock worker,  
17 drywall applicator and street carpenter. (AR 16.) The ALJ, however, also found that  
18 considering Claimant's age, education, work experience and RFC, there are jobs that  
19 exist in significant numbers in the national economy that Claimant could have performed.  
20 (AR 16.)

21 Consequently, the ALJ found that Claimant was not disabled, within the meaning  
22 of the Social Security Act, from June 6, 2009, the alleged onset date, through June 13,  
23 2013, the date last insured. (AR 17.)

## DISCUSSION

24 Plaintiff now concedes that he was not disabled after November, 2010 but claims  
25 a closed period of disability from June 6, 2009 until November, 2010 for right upper  
26 extremity limitations. The ALJ properly discounted Plaintiff's credibility. The ALJ's RFC  
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1 is supported by substantial evidence. The ALJ's nondisability decision is supported by  
2 substantial evidence and free of legal error.

3 **A. Relevant Federal law**

4 The test for deciding whether to accept a claimant's subjective symptom testimony  
5 turns on whether the claimant produces medical evidence of an impairment that  
6 reasonably could be expected to produce the pain or other symptoms alleged. Bunnell  
7 v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991); see also Reddick v. Chater, 157 F.3d 715,  
8 722 (9th Cir. 1998); Smolen, 80 F.3d at 1281-82 & n.2. The Commissioner may not  
9 discredit a claimant's testimony on the severity of symptoms merely because it is  
10 unsupported by objective medical evidence. Reddick, 157 F.3d at 722; Bunnell, 947  
11 F.2d at 343, 345. If the ALJ finds the claimant's symptom testimony not credible, the  
12 ALJ "must specifically make findings which support this conclusion." Bunnell, 947 F.2d  
13 at 345. These findings must be "sufficiently specific to permit the court to conclude that  
14 the ALJ did not arbitrarily discredit [the] claimant's testimony." Thomas v. Barnhart, 278  
15 F.3d 947, 958 (9th Cir. 2002); see also Rollins v. Massanari, 261 F.3d 853, 856-57 (9th  
16 Cir. 2001); Bunnell, 947 F.2d at 345-46. Unless there is evidence of malingering, the  
17 ALJ can reject the claimant's testimony about the severity of his symptoms only by  
18 offering "specific, clear and convincing reasons for doing so." Smolen, 80 F.3d at  
19 1283-84; see also Reddick, 157 F.3d at 722. The ALJ must identify what testimony is  
20 not credible and what evidence discredits the testimony. Reddick, 157 F.3d at 722;  
21 Smolen, 80 F.3d at 1284.

22 **B. The ALJ Properly Discounted Claimant's Credibility**

23 Plaintiff alleges disability based on pain in his right shoulder and elbow. In  
24 determining Plaintiff's RFC, the ALJ concluded that some of Plaintiff's medically  
25 determinable severe impairments perhaps could be expected to cause his alleged  
26 symptoms. (AR 16.) The ALJ, however, also found that Plaintiff's statements regarding  
27 the intensity, persistence and limiting effects of these symptoms are "not entirely  
28 credible." (AR 16.) Because the ALJ did not make a finding of malingering, he was

1 required to provide clear and convincing reasons supported by substantial evidence to  
2 discount Plaintiff's credibility. Smolen, 80 F.3d at 1283-84. The ALJ did so.

3 1. Medical Evidence

4 First, the ALJ found "insufficient objective medical signs and laboratory findings to  
5 support significant right upper extremity postural limitations." (AR 15.) An ALJ is  
6 entitled to consider whether there is a lack of medical evidence to corroborate a  
7 claimant's alleged pain symptoms so long as it is not the only reason for discounting a  
8 claimant's credibility. Burch v. Barnhart, 400 F.3d 676, 680-81 (9th Cir. 2005). Here, the  
9 ALJ found that the medical evidence indicated no fractures on X-rays during the relevant  
10 period, range of motion within normal limits and full motor strength in all four extremities  
11 consistently. (AR 13, 246, 247, 249.) A June 8, 2009 physical examination was  
12 "remarkably benign," with full motor strength and negative for signs of shoulder  
13 impingement. (AR 14, 270.) The ALJ did note degenerative joint disease in the  
14 claimant's right elbow (AR 14) which he characterized as a severe impairment. (AR 13.)  
15 Treatment notes in June 2009, however, indicate that despite the severe degenerative  
16 change in the elbow and some swelling and tenderness, Plaintiff had normal range of  
17 motion of the elbow and there was no acute injury. (AR 246, 247, 249, 251.) After a  
18 motorcycle accident in late 2009, an X-ray showed no fracture, dislocation, broken ribs  
19 or tissue swelling, and was considered unremarkable. (AR 281, 291, 297, 298.) An  
20 October 8, 2010 examination revealed normal musculoskeletal range of motion. (AR  
21 14.) The ALJ also noted that Claimant presented "no medical assessment form or  
22 medical opinions from any treating physician willing to support his application for Social  
23 Security disability benefits." (AR 16.) By contrast, the ALJ's light work RFC is supported  
24 by medical assessments in 2009 (AR 266) and 2012. (AR 705-706.)

25 Plaintiff asserts that the ALJ should have considered a closed period of disability  
26 between the alleged onset date and November 2010, but the ALJ clearly did so. The  
27 ALJ found Plaintiff was not under a disability "at any time from June 6, 2009 . . . through  
28 June 30, 2013." (AR 17.) The ALJ findings cited above are for the period between June



1 6, 2009 and November 2010. Medical evidence cited by Plaintiff after November 2010 is  
2 not of consequence because of Plaintiff's concession that he was not disabled after that  
3 date, as discussed below.

4 Plaintiff's contention that the ALJ ignored medical evidence supporting the alleged  
5 impairments lacks merit. The ALJ found that Plaintiff had the following severe  
6 impairments: "back pain with minor degenerative changes and right elbow degenerative  
7 joint disease, and a combination of shoulder and foot pain by history with obesity." (AR  
8 13.) This finding indicates the ALJ considered all medical evidence, including the  
9 evidence Plaintiff claims he ignored. In particular, the ALJ explicitly refers to the X-ray  
10 showing degenerative joint disease of the elbow (AR 14) that Plaintiff says he ignored  
11 and acknowledged it as an impairment. (AR 13.) Plaintiff mistakenly focuses on  
12 evidence of impairment, but impairment alone does not establish disability. Young v.  
13 Sullivan, 911 F.3d 180, 183 (9th Cir. 1990). Claimant must show that the impairment  
14 causes disabling functional limitations that preclude the ability to engage in substantial,  
15 gainful employment. 42 U.S.C. § 423(d). Here, the ALJ determined, based on  
16 substantial evidence, that the medical evidence was insufficient to support "significant  
17 right upper extremity limitations."

18 Plaintiff disagrees with the ALJ's finding regarding the medical evidence but the  
19 ALJ is the one responsible for resolving conflicts in the medical evidence and  
20 ambiguities in the record. Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995).  
21 Where the ALJ's interpretation of the record is reasonable, as it is here, it should not be  
22 second-guessed. Rollins, 261 F.3d at 857.

## 23 2. Non-Compliance With Treatment

24 The second reason given by the ALJ for discounting Plaintiff's credibility was that  
25 he was non-compliant with physical therapy referrals on multiple occasions. (AR 15,  
26 13.) A failure to follow treatment recommendations is a valid reason for discounting a  
27 claimant's credibility. Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008) (ALJ  
28 may consider "unexplained failure to seek treatment or to follow a prescribed course of



1 treatment"). The record evidence is compelling. Therapist notes on April 28, 2010  
2 indicate "Patient was not compliant with PT treatment plan, either by missed  
3 appointments and/or not making future appointments." (AR 387, 388.) Plaintiff claims  
4 he had a problem making an appointment due to a fall but the therapist noted that there  
5 was no fracture and the patient reported his pain level at only 3 or 4 out of 10. (AR 386.)  
6 Another note, moreover, this one in May 2010 apparently by a physician, indicates  
7 Claimant "[d]idn't go to therapy in May." (AR 402.) There was no explanation given.  
8 Plaintiff, moreover, never mentioned a fall at an April 2, 2010 doctor's appointment (AR  
9 376-384) and, as noted above, the medical professionals did not accept this explanation.  
10 Again, it is the ALJ's responsibility to resolve ambiguities in the record, Andrews, 53 F.3d  
11 at 1039, and where the ALJ's interpretation of the record is reasonable, as it is here, it  
12 should not be second-guessed. Rollins, 261 F.3d at 857.

### 13 3. Unemployment Benefits

14 The ALJ's third reason for discounting Plaintiff's credibility is his lack of candor  
15 regarding the duration of his alleged disability. Plaintiff initially sought disability for the  
16 period from the alleged onset date of June 6, 2009 through the date last insured of June  
17 30, 2013. His December 12, 2012 Exertion Questionnaire alleges disabling pain. (AR  
18 168-170.) Yet Plaintiff reported to his physician on October 29, 2010 that "he was ready  
19 to go back to work on 11/10" (AR 13, 15, 436) and the treatment record ends here.  
20 Plaintiff, moreover, received unemployment benefits during 2011 and 2012, which  
21 requires one to represent the ability to do full-time work. (AR 13, 15.) Plaintiff tries to  
22 salvage the situation by seeking a closed disability period from the onset date through  
23 November 2010. Plaintiff argues he sought unemployment benefits only after he was  
24 ready to return to work. As the ALJ specifically noted, however, he applied for Social  
25 Security benefits on August 31, 2011, arguing he had been unable to work for more than  
26 two years, well after his disability ended. (AR 15, 22, 60, 132.)

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